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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 403

WILLIAM T. LOESCH,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the order of the Federal Trade Commission ordering petitioner to cease and desist certain trade practices.

Opinion Below

The opinion of the Court of Appeals has not yet been reported. It is printed, *infra*, pages 11 and 15, as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1958. See Appendix B, *infra*, page 15.

The jurisdiction of this Court is invoked under Section 5(c) of the Federal Trade Commission Act (15 U.S.C., Sec. 45(c)). The same section of this Act confers jurisdiction on the Federal Trade Commission, and also confers jurisdiction upon the circuit courts of appeals of the United States to review orders of the Commission.

Question Presented

Whether the Hearing Examiner of the Federal Trade Commission denied petitioner due process of law guaranteed by The Fifth Amendment to The Constitution of the United States of America in arbitrarily and capriciously denying right of cross-examination of Commission's expert witnesses, Doctors Rostenberg and Rattner.

Statement of the Case

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit dated June 30, 1958, an order of the Federal Trade Commission entered November 14, 1957, requiring petitioner to cease and desist from using certain claims in his advertising of his home treatment and preparations for the hair and scalp (R. 29a of record in court below).

Petitioner now asks this Court to set aside the said order of the Commission and judgment of the Court of Appeals on the ground that the Hearing Examiner in taking evidence in this proceeding denied the petitioner due process of law guaranteed by The Fifth Amendment to The Constitution of the United States of America in that said Hearing Examiner arbitrarily and capriciously denied petitioner right of cross-examination of respondent's expert witnesses.

The principal evidence offered by respondent against petitioner was that of three medical experts, Doctors Behrman, Rostenberg, and Rattner. Dr. Behrman was examined in New York City on September 13, 1955, the hearings then

recessed for one day, September 14, 1955, and Dr. Rostenberg was examined on September 15, 1955, and Dr. Rattner on September 16, 1955. The hearings were recessed September 14, 1955, so that respondent's attorney supporting the complaint would have an opportunity during that day to confer with his medical experts in Chicago, Doctors Rostenberg and Rattner, and be ready for their examination on September 15 and 16, 1955.

On September 15, 1955, when petitioner's attorney began to cross examine Dr. Rostenberg concerning his conversation the day before with the respondent's attorney, the Hearing Examiner; although there was not objection to the line of questioning by the respondent's attorney, stopped the cross-examination, delivered a reprimand of petitioner's attorney, and refused to permit him to pursue the line of cross-examination further. (R. 44a). The following day, September 16, 1955, upon inquiry by petitioner's attorney, the Hearing Examiner stated that his ruling would be the same as the previous day during cross-examination of Dr. Rostenberg concerning conversations between the doctor and the respondent's attorney, and cut off this line of inquiry to petitioner's attorney. (R. 46a).

It is the action and order of the Commission, and the judgment of the United States Circuit Court of Appeals for the Fourth Circuit affirming this order, that petitioner asks this Court to review.

Reason for Granting Writ

The decision of the court below is diametrically opposed to and in irreconcilable conflict with *Jencks* v. *United States*, 353 U. S. 657, 77 S. Ct. 1007 (1957); and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by an administrative body, as to call for an exercise of this Court's power of supervision.

On September 15, 1955, after respondent's attorney had conducted the examination in chief of Dr. Rostenberg and the petitioner's attorney had begun his cross-examination of the doctor, the petitioner's attorney began to question the doctor concerning his conversation the day before with the respondent's attorney. From time immemorial such questions on cross-examination—who have you talked with: what did you talk about concerning the facts of this case: and similar questions—have been customary as means of testing credibility, interest, motive, and bias. The Hearing Examiner, although there was no objection to the line of questioning by the respondent's attorney, stopped the cross-examination and delivered a reprimand of petitioner's attorney. The Hearing Examiner charged petitioner's attorney with an effort to smear the witness and the respondent's attorney by this line of questioning. (R. 45a). The following day, September 16, 1955, during the cross-examination of respondent's expert witness Dr. Rattner, preparatory to asking the witness questions about his conversation with the respondent's attorney on September 14, 1955, petitioner's attorney inquired of the Hearing Examiner if he would be permitted to do so or if the Hearing Examiner's ruling would be the same as on September 15 during cross-examination of Dr. Rostenberg. Whereupon the Hearing Examiner stated that his ruling would be the same. (R. 46a). Accordingly petitioner's attorney did not ask any such questions and proceeded to other questions.

The Commission, in its Opinion, dated November 14, 1957 (R. 41a) states, "No question was pending at the time of the hearing examiner's remarks. . . ." Attention of the Court is respectfully invited to the fact that at the time the Hearing Examiner stopped the line of questioning that there was a question pending which petitioner's attorney had not been permitted to complete as follows: "Q. As I understood your testimony, where . . ." (R. 45a).

The right of cross-examination is a valuable right, and not a mere privilege of the one against whom a witness may be called. It is a right of such magnitude, a part and parcel of due process of law, that it is guaranteed by The Fifth Amendment to The Constitution of the United States of America and by the decisions of this Court. *Alford* v. *United States*, 282 U.S. 687, 75 L. ed. 624, 51 S. Ct. 218 (1930).

Almost this identical situation was before the Municipal Court of Appeals for the District of Columbia and the Court in that case very properly held it error to exclude such questions. *Solar* v. *United States* (M.C.App.D.C.), 94 A. 2d 34 (1953).

Necessarily, such questions are relevant. The medical expert was on the witness stand testifying under oath of facts and opinions concerning matters in the case. The evidence clearly showed that he had discussed those same facts and opinions in unsworn statements within a matter of hours prior to his sworn statements. The Court refused to permit cross-examination of the doctor as to his out-of-Court statements on the same facts and opinions. In excluding such cross-examination, as the Court pointed out in the *Solar Case*, *supra*, the effect of the trial court's ruling was not to limit the right of cross-examination, but to deny it. The Court there said:

> "We think the action of the Trial Court in telling the jury to disregard the question and answer was not only error but also prejudicial error. As we have said, the Government's case rested largely on the testimony of this witness. Obviously his credibility was of vital importance in the case. We think appellant had the right to show or attempt to show that witness's recollection was hazy and had been refreshed by conference with the prosecuting attorney's office. In other words, appellant had the right by this means

to test the accuracy and reliability of witness's recollection and had the right to have the jury consider any facts thus brought out that might have bearing on the credibility of the witness."

Generally, interference with this line of questioning is considered prejudicial, and a denial of due process, and entitles the aggrieved person to a new trial. See 35 A.L.R. 2d 1039 and Annotation.

Basically this was the error corrected by this Court in *Jencks* v. *United States*, *supra*. In that case a witness had taken the stand and testified of facts under oath. On cross-examination, it appeared that this witness had made out-of-Court, unsworn, written and oral, statements on the same subject matter. Inherent in the Court's decision is the principal that the cross-examiner has the right to bring out what the witness stated out of Court, orally or in writing, on another occasion, on the same subject matter, so that it might be laid alongside the statements in court and his reliability and credibility thus determined and examined.

It clearly appears that the court below in its opinion unjustifiably, and narrowly, limited the *Jencks Case*, *supra*. The court there said, "In the instant case, the production of no document in the hands of the government was sought, and the *Jencks* doctrine is not involved." Clearly, a fair reading of the *Jencks* decision, reveals that a witness's out-of-court statements, oral or written, on the same subject-matter involved in the trial wherein he is testifying, and on the same facts he is testifying, are relevant and material, and he may be confronted with them, and if they are written records the government may be made to produce those records if they put that witness on the stand. And, as the Court pointed out in the *Solar Case*, *supra*, it is not a question of "discretion" and "reasonable bounds", but

to deny counsel on cross-examination, the right to examine a witness on his out-of-court statements, oral or written, on the same subject matter, is a denial of the right of cross-examination.

It further appears clearly that the court below, in its opinion, bases its opinion and judgment on erroneous facts and considerations. The court states that if the cross-examiner intended to probe the possibility that the witness had made conflicting statements earlier, he did not make it clear that this was his purpose and that his aim was not merely to harass the witness. It is not known how conflicting statements can be shown other than to lay alongside each other, statements on the same subject matter made on different occasions, because it is only then that conflicts become apparent. Of course, such inquiries are always embarrassing to a witness who has made conflicting statements on the same subject he has made on other occasions but should not harass him, if he is honest.

Next, the court states that it is not left with the impression that counsel was actually intimidated. First, it is earnestly argued to this Court that counsel, in the face of an adverse ruling of the court, need not persist until counsel is "intimidated". Intimidation of counsel is not at issue. The issue is whether the trial court conducted a fair hearing and admitted or excluded evidence properly. The orderly administration of justice, and the dignified operation of courts, is paramount. The judge is in charge of the proceedings and when the judge makes a ruling, attorneys, in discharge of the duty and respect owed to the court, should accept the ruling, not become obnoxious and persist in the same line of questioning, else the whole proceeding breaks down, and becomes an undignified squabble.

Finally, the court begs the whole question in stating that because the out-of-court statements were oral, "The

hope, in the circumstances shown, is too remote and insubstantial to be made the foundation for a claim of prejudice in the barring of the inquiry, and certainly nothing resembling denial of due process appears." First, it is rare that the opportunity to confront a witness on cross-examination with an out-of-court written statement appears; the usual circumstance is that the out-of-court statement was oral. The truth of the matter is that today neither the hearing examiner, nor the Court below, nor anyone else, knows what the doctor would have stated in response to this line of questioning, certainly in a most relevant and material field of inquiry. As this Court said in the *Jencks Case* the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established when it was shown that the statements were of the events and activities related in the witness's testimony.

But, says the court below, extensive cross-examination of each of the three government experts on the subject of the direct testimony was in fact permitted. As pointed out in the *Jencks Case*, the government's witnesses were subjected to vigorous cross-examination, but that did not cure the error of excluding the out-of-court statements of the witnesses.

It would appear, that the court below has yet to pass on the ruling of the hearing examiner. In its opinion, the court states: "Moreover, apart from *technical correctness* of the Hearing Examiner's ruling . . ." Of course rulings on all matters of procedure and procedural questions themselves are technical. Obviously, in using the word "technical", the court below cannot be referring to determination of prejudice, whether the out-of-court statements concerned substantial things, for the simple reason that neither that court nor anyone else knows today what the witness's statements were because he was not permitted to testify

to them on cross-examination. And this is a substantial requirement of due process.

It is respectfully submitted that the question presented in this case is important and of great national interest because the standards by which inferior judicial and administrative bodies pass upon property and human rights of citizens is being determined. Were the standards of the hearing examiner, in taking evidence on which the rights of this petitioner were determined, such that this Court can give them the stamp of approval. Literally hundreds of administrative bodies are everyday following rules laid down for them by the courts. It is earnestly argued and contended that such approval should not be given because the action of the Hearing Examiner ignored rules of long standing and were shocking to one's sense of justice. In addition thereto the writ should be granted because the decision of the court below, as hereinabove stated, is in direct conflict with the *Jencks Case, supra.*

Conclusion

WHEREFORE, for the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD M. WELLING,
807 Law Building,
Charlotte 2, N. C.,
Counsel for Petitioner.

September 17, 1958.

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7610

WILLIAM T. LOESCH, an individual doing business as LOESCH HAIR EXPERTS, *Petitioner*,

versus

FEDERAL TRADE COMMISSION, *Respondent*

On Petition for Review of an Order of the Federal Trade Commission

(Argued June 17, 1958. Decided June 30, 1958.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and PAUL, District Judge.

Richard M. Welling for Petitioner, and James M. Henderson, Attorney, Federal Trade Commission, (Earl W. Kintner, General Counsel; James E. Corkey, Assistant General Counsel, and J. B. Truly, Attorney, Federal Trade Commission, on brief) for Respondent.

SOBELOFF, Chief Judge:

The manufacturer of a hair remedy who was ordered by the Federal Trade Commission to cease and desist from making certain advertising claims which the Commission found false and misleading seeks review of the order. He raises a single issue, whether he was arbitrarily and capriciously restricted in cross-examination of Government witnesses before the hearing examiner. Violation of the due process clause of the Fifth Amendment is asserted.

The Federal Trade Commission's complaint charged William T. Loesch, an individual doing business as Loesch Hair Experts,[1] with false advertising. The Commission

[1] William B. Zimmerman, Loesch's advertising agent, was also a party to the proceedings below, but he did not appeal from the hearing examiner's initial decision and is not a petitioner here.

offered in evidence his advertisements, which, in summary, represented that his preparation, if used in the suggested manner, would kill bacteria beneath the scalp; eliminate dandruff; cure all local scalp diseases; stop excessive hair fall; prevent all types of baldness, including "male-pattern-type" baldness; and induce new hair to grow and old hair to become thicker. Loesch also held himself out as a "trichologist."

To refute these several claims, the Government offered the testimony of three medical experts, Dr. Behrman, Dr. Rostenberg, and Dr. Rattner. Dr. Behrman, the first of the three to testify, was examined in New York City on September 13, 1955. At the conclusion of his testimony, the hearings recessed until September 15, so that, according to Loesch, the Government attorney would have a day's interval to confer with his medical experts in Chicago, before resuming hearings there.

In Chicago, on September 15, Dr. Adolph Rostenberg, Jr., a dermatologist and teacher at the University of Illinois, was the Government's witness. In the course of cross-examination, Loesch's counsel asked him whether he talked to the Government lawyer before taking the stand. The doctor said that he had, and the Government counsel conceded it. Loesch's lawyer then began to question the doctor as to whether the Government's lawyer had told him of Dr. Behrman's classification of baldness. Dr. Rostenberg replied that "we didn't go into any explicit testimony that Dr. Behrman did give." The witness stated that the Government lawyer had asked him some of the same questions as in direct examination.

The hearing examiner then turning to Loesch's counsel said "You were intimating that Mr. Callaway [the Government attorney] told him what Dr. Behrman testified, so he testified the same. As a matter of fact, he didn't testify the same . . . You are trying to smear the witness and Mr. Callaway by asking him what Mr. Callaway told him to testify. I don't like things like that. We deal with men who can't be told things like that. Even if Mr. Callaway was that type of lawyer, which he isn't, from my experience, we don't do business that way . . . ."

When Dr. Rattner, the third Government expert, testified the next day, the following colloquy occurred between Loesch's lawyer and the examiner:

> Q. Now, your Honor, I don't care to go into this about with whom the doctor talked and preparation for this hearing. If your rulings will be the same I will let the record show it.
>
> Hearing Examiner: Yes.
>
> Mr. Welling: Could the record show that the question would be overruled if I asked who the doctor talked with in preparation for this hearing?
>
> Hearing Examiner: No, I have no objection to the doctor testifying as to whether he talked with Mr. Callaway before he took the stand. I assume that any lawyer, when he puts a witness of this type on the stand, talks to him before he puts him on the stand. He wouldn't be exercising proper judgment if he didn't do so, so I certainly don't want, by virtue of that, to refuse permission or draw any—don't want the Commission to draw any unfair or improper conclusions from the fact that he has talked to him.
>
> Mr. Welling: Well, Sir, if there is going to be the same ruling as yesterday——
>
> Hearing Examiner: Yes, my ruling would be the same on that type of question.

Loesch's counsel did not further press this line of interrogation, or indicate for the record what he expected to elicit from the witness. In the argument of the appeal he conceded that he had no particular point in mind. He insisted, however, that in his experience witnesses, thus questioned, often are disconcerted and the effect of their testimony is diminished.

Extensive cross-examination of each of the three Government experts on the subject of the direct testimony was in fact permitted. Further cross-examination to elicit whether the witness had, at the interview with the Government's counsel or on other occasions, expressed views in conflict with his direct testimony, was not specifically precluded. If the cross-examiner intended to probe this possi-

bility, he did not make it clear that this was his purpose, and that his aim was not merely to harass the witness. His explanation on appeal is that the hearing examiner's rebuke discouraged further pursuit of the matter, and that he was forced to abandon this phase and leave unclear the purpose of the challenged question. Reading the record, however, we are not left with the impression that counsel was actually intimidated.

The hearing examiner might well have refrained from criticizing the lawyer. Nevertheless, this brush between examiner and counsel pertained to a minor incident in a vigorously contested trial, which had no material effect, and could not have prejudiced Loesch's case.

The contention made for Loesch is that by cutting off cross-examination, the hearing officer violated the rule of the *Jencks* case, *Jencks* v. *United States*, 353 U.S. 657 (1957), and thereby denied him due process of law as guaranteed by the Fifth Amendment. His argument proceeds substantially as follows: The spirit of the Supreme Court's decision in the *Jencks* case is that a witness may be confronted on cross-examination with any earlier statement; and, if even papers in the Government's possession may be demanded, surely the witness may be asked what he told the lawyer who called him to the stand. The point need not be laden down with a discussion of *Jencks*. It is recognized that a witness is subject to cross-examination within reasonable bounds to test his credibility, and *Jencks* need not be invoked here to establish this rule. See, 3 Wigmore, Evidence (1940), Secs. 1022, 1023, p. 697 *et seq.*, Cf., 5 U.S.C.A., Sec. 1006c, A.P.A. Sec. 7c. In the instant case the production of no document in the hands of the Government was sought, and the *Jencks* doctrine is not involved.

Moreover, apart from the technical correctness of the hearing examiner's ruling, in appraising the practical consequences of the exclusion of the testimony, it must be realized that there is a difference between confronting a witness with an earlier written statement, which it is too late for him to alter, and asking him what he said orally on a former occasion in the hope of developing a conflict with his present testimony. The hope, in the circumstances

shown, is too remote and insubstantial to be made the foundation for a claim of prejudice in the barring of the inquiry, and certainly nothing resembling denial of due process appears.

As Mr. Justice Black, speaking for a unanimous Court in *Reilly* v. *Pincus*, 338 U.S. 276 (1949), said: "The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency.'" See also, Davis, Administrative Law, (1951), Sec. 148, p. 469 *et seq.* The scope and extent of cross-examination is ordinarily within the discretion of the court or examiner, and we think that no prejudicial or arbitrary exercise of that discretion has been shown.

Affirmed and Enforced.

EXHIBIT B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7610

WILLIAM T. LOESCH, an individual doing business as LOESCH HAIR EXPERTS, *Petitioner*,

versus

FEDERAL TRADE COMMISSION, *Respondent*

On Petition for Review of an Order of the Federal Trade Commission

This cause came on to be heard on the petition of William T. Loesch, an individual doing business as Loesch Hair Experts, for review of a certain order issued by the Federal Trade Commission against said petitioner on the 14th day of November, 1957, In the Matter of William T. Loesch, an individual doing business as Loesch Hair Experts, and William B. Zimmerman, an individual doing business as

Zimmerman Advertising, Federal Trade Commission Docket No. 6305; upon the transcript of record certified and filed in this Court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit this 30th day of June, 1958, that said order of the Federal Trade Commission, in said cause be, and the same is hereby, affirmed and enforced; and that said petitioner abide by and perform the directions of the Federal Trade Commission in said order contained.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.
CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.
JOHN PAUL,
United States District Judge.

A true copy. Teste:

RICHARD M. F. WILLIAMS,
Clerk, U. S. Court of Appeals
for the Fourth Circuit.

(2064-4)